IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 579.

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN, *Petitioners,*

v.

JULIUS H. WOLPE, ET AL., and CHARLES W. KUTZ, ET AL., as Members of the Zoning Commission of the District of Columbia, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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CITATIONS.

MISCELLANEOUS.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harry Poretsky, Arthur W. Machen, Trustee, and Thomas Machen, pray that a Writ of Certiorari issue to review the decision of the United States

Court of Appeals for the District of Columbia entered June 19, 1944 (R. 85), (petition for rehearing denied July 13, 1944 (R. 89)) in case No. 8546, that Court having assumed to grant a special appeal from an order of the District Court of the United States for the District of Columbia denying to Wolpe et al., of respondents herein, leave to intervene in an action by the present petitioners as plaintiffs against the Zoning Commission of the District of Columbia as sole defendant, under F. R. C. P. 24(b) (2) *after* judgment therein in favor of plaintiffs had been rendered by the District Court and carried into effect by the Zoning Commission of the District of Columbia, defendant therein, and *after* the time had expired within which a motion for a new trial could be made or an appeal could be taken. In the United States Court of Appeals for the District of Columbia the judgment of the District Court denying said intervention was reversed.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Columbia appears in this record at pages 77-78. The opinion of the United States Court of Appeals for the District of Columbia appears in this record at pages 85-87.

RULES AND STATUTES INVOLVED.*

F. R. C. P. 24 (28 U. S. C. A. foll. 723 c)

Rule 10 of the General Rules of the United States Court of Appeals for the District of Columbia (prior to the amendment thereof January 7, 1944).

Zoning Act for the District of Columbia (Act of March 1, 1920, 41 Stat. 500, amended by Act of June 30, 1938, 52 Stat. 797, 800, D. C. Code, 1940 edition, Title 5, Sec. 412, et seq., Sec. 422).

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* The Rules and Statutes involved (except F. R. C. P.) are set out in Appendix p. 27-29).

STATEMENT OF MATTER INVOLVED.

This case involves the question whether owners of property in the neighborhood of a Parcel of land have a right under F. R. C. P. 24 to intervene in an action by the owners of said Parcel against the Zoning Commission to require it to restore to said Parcel the zoning classification existing prior to a change thereof by said Zoning Commission, and whether an application for intervention is timely under the circumstances of the case.

In 1933 the Zoning Commission of the District of Columbia zoned for apartment house use a city block known as Parcel 70/100 and owned by petitioners Machen.

In May, 1941, petitioner Poretsky contracted to buy the Parcel for $77,500, and in September, 1941, filed with the Building Inspector his application and plans for an apartment house on the Parcel (R. 49, 51). On November 7, 1941, the Zoning Commission changed the zoning and restricted the use of the Parcel to detached single-family dwellings (R. 53).

On February 11, 1942, the petitioner Poretsky filed this action in the District Court of the United States for the District of Columbia against the respondent Zoning Commission as sole defendant, to annul its said order of November 7, 1941, and for a mandatory injunction for restoration of the prior apartment house zoning of said Parcel (R. 3, 12). Petitioners Machen intervened as parties plaintiff. After a trial, during which the trial justice made a personal inspection of the Parcel and of the neighborhood, the District Court found "that the action of the Zoning Commission was unreasonable, arbitrary, capricious and void" (R. 55). (Cf. *Nectow* v. *Cambridge,* 277 U. S. 183, 72 L. ed. 842.)

On April 7, 1943, final judgment was entered in favor of plaintiffs (R. 56). The Zoning Commission then voted unanimously not to appeal from the judgment and carried the judgment into effect (R. 75).

On May 6, 1943, respondents Wolpe et al., being owners of property in the vicinity of said Parcel, filed a motion

under F. R. C. P. 24 (b)(2) (Permissive Intervention) for leave to intervene in order to move for a new trial, or, in the alternative, to be allowed to appeal the judgment. This motion was *not* accompanied by a proposed intervening petition (R. 57), (F. R. C. P. 24 (c)) but said petition was filed May 8, 1943 (R. 57). This was too late under F. R. C. P. 59 to move for a new trial and too late to appeal under Rule 10 of the General Rules of the United States Court of Appeals for the District of Columbia (Appendix p. 29).

None of said proposed intervenors had any ownership of or financial, direct and immediate interest in said Parcel, had acquired no right of intervention, there had been no violation of the zoning law (D. C. Code 1940, Title 5-422, Appendix p. 28) and none of their properties adjoins or is contiguous to said Parcel, but all are separated therefrom by public streets and most of them are one or more city blocks distant (R. 67).

The motion to intervene was denied, the District Court holding (R. 77, 78) that (1) the time for filing motion for a new trial had expired before the motion was made; (2) intervention could not be allowed after final judgment; (3) the public interest was represented by the defendant Zoning Commission; and (4) the case had been fully heard, testimony taken, and fully argued and there was nothing stated in the intervening petition that would cause the Court to change its view even if the proposed intervenors had been made parties.

The United States Court of Appeals for the District of Columbia granted a special appeal (R. 79), and on June 19, 1944, reversed and remanded the case (R. 88). On July 13, 1944, it denied petition for rehearing (R. 89).

The judgment of said Court of Appeals is final as to the petitioners and entitles them to apply for the writ of certiorari because it settled the right of respondents Wolpe et al. to intervene and it is not subject to review except by this Court. (Section 240-A, Judicial Code, 28 U. S. C. 347-A.)

The case was remanded in order that a general appeal from said final judgment in the main action may be considered on its merits in the United States Court of Appeals for the District of Columbia, in spite of the determination of the Zoning Commission not to appeal said final judgment (R. 75), and in spite of the fact that the time had expired within which either to move for a new trial or to appeal.

JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. Sec. 347-a).

July 13, 1944 is the date of the order denying the petition for rehearing in the United States Court of Appeals for the District of Columbia (R. 89) of the decision of said Court rendered June 19, 1944 (R. 85).

QUESTIONS PRESENTED.

1. Does F. R. C. P. 24 authorize or permit intervention in an action by a property owner against a Zoning Commission instituted for the purpose of compelling the restoration of a prior existing zoning classification of plaintiff's property (1) where none of the proposed intervenors has any interest in said property; (2) where none of the properties of the proposed intervenors was adjoining or contiguous to plaintiff's property, but all were separated therefrom by public streets and many of said properties were one or more city blocks from plaintiff's property; (3) where no violation of the zoning law was involved, (4) where the final judgment in the main action had been entered and complied with by the defendant Zoning Commission before the application for intervention; and (5) where the public interest was represented by the Zoning Commission and the proposed intervenors were not and could not be bound by the judgment and their application presented

no claim or defense having a question of law or fact in common with that in the main action?

2. Is an order appealable which denies a motion for leave to intervene in an action against the Zoning Commission of the District of Columbia to require it to restore a prior existing zoning classification of a tract of land (1) where the motion to intervene was made by persons who had full knowledge of the pendency of the action, but was made *after* (a) the final judgment in the main action had been entered; (b) the time for moving for a new trial had expired; (c) the time to appeal had also expired; (d) the Zoning Commission, defendant in the main action, had refused to appeal and had carried the judgment into effect; and (2) where the proposed intervenors had no ownership or financial interest in the aforesaid tract of land, and (3) where the object of said motion was to impeach the judgment already granted by moving for a new trial, or, in the alternative, that the proposed intervenors be allowed to appeal said final judgment?

3. Is such a motion for leave to intervene "*timely*" under F. R. C. P. 24 (a) or (b), *after* the final judgment in the main action has been entered by the court and carried into effect by the defendant, Zoning Commission?

4. Do persons having neither ownership nor financial interest in the Parcel aforesaid, have such a direct and immediate interest in the *res* as to entitle them to intervene under F. R. C. P. 24 (a) or (b) *after* the final judgment has been rendered in the main action requiring the Zoning Commission to restore the prior existing zoning classification of said Parcel and *after* said final judgment has been carried into effect by the Zoning Commission and the prior zoning restored?

5. The rights of the original parties to this action having been adjudicated *before* the filing herein of the motion for leave to intervene, do not the decisions of this Court

(as illustrated by *United States* v. *California Co-op Canneries*, 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. 423) forbid the granting of said motion for leave to intervene, and does not F. R. C. P. 24 (b) under which said motion herein was filed, in effect, also forbid the granting of said motion by the declaration that "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties"?

REASONS FOR GRANTING THE WRIT.

1. The application of F. R. C. P. 24 to cases involving zoning has never before been determined by this Court, or any other federal court, and is a matter of national scope, interest and importance.

2. The United States Court of Appeals for the District of Columbia has so far departed from the accepted and usual principles of intervention that its decision in this case is in conflict with applicable decisions of this Court, as well as decisions of the Circuit Courts of Appeal. No other federal court has extended intervention under F. R. C. P. 24 so as to give to persons having no direct and immediate interest in the *res* either the absolute or permissive right to intervene in a case, particularly after the judgment in the case has been performed, and where no right of intervention is given by law.

3. The decision below, granting and sustaining leave to intervene as matter of right under F. R. C. P. 24(a)(2), upon an appeal from the order denying permissive leave to intervene in the case under F. R. C. P. 24(b)(2) after the final judgment in the principal action had been performed by the defendant, is in direct conflict with the decisions of this Court, illustrated by *United States* v. *California Co-op Canneries, supra, and Allen Calculators, Inc.* v. *National Cash Register Co.* .... U. S. ...., 88 L. ed. Advance Opinions 874, and is also in direct conflict with the deci-

sions of the Circuit Courts of Appeal, illustrated by *San Antonio Utilities League* v. *Southwestern Bell Telephone Company*, 86 F. (2) 584 (C. C. A. 5th 1936) and *Board of Drainage Commissioners* v. *Lafayette Southside Bank*, 27 F. (2d) 286 (C. C. A. 4th, 1928).

4. The matter of the timeliness of the intervention under F. R. C. P. 24 is an important question of federal practice which has not been, but should be, settled by this Court.

5. The United States Court of Appeals for the District of Columbia has decided an important question of local law in a way probably in conflict with the zoning law of the District of Columbia and with applicable local decisions such as *Bugher* v. *Gottwals*, 60 App. D. C. 340, 341, 54 F. (2d) 451; *Hazen* v. *Hawley*, 66 App. D. C. 266, 272, 86 F. (2d) 217.

WHEREFORE, it is respectfully submitted that this Court should grant the writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia in case No. 8546 below.

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